

Increasing Concerns About Senate Retroactive and Government Immunity Legislation

Dear Members of the House Law and Justice Committee,

In recent months, several organizations have come forward with concerns over Senate-passed legislation that would retroactively reopen the civil statute of limitations for certain crimes. As you know, these measures would allow for claims to come forward that have been barred since 1997.

Retroactive liability is expected to have a crippling financial impact upon public, private and non-profit institutions, both large and small. And because the legislation removes government immunity, taxpayers would take the responsibility for any claims brought against a state entity. It is important to note that no state in the country has passed legislation that removes government immunity for retroactive claims. As such, the Senate-passed legislative package now before you is without precedent.

Please find attached a compilation of opposition brought forward to date regarding this Senate package. Those expressing their position include Michigan Chamber of Commerce, Michigan Association of School Boards, Michigan Association of School Administrators, Michigan Community Colleges Association, Michigan Catholic Conference, Michigan Association of Counties, Michigan Townships Association, Michigan Municipal League, ACLU, and Michigan Association of State Universities. Michigan Nonprofit Association and Michigan Society of Association Executives have alerted their members to the legislation. Specific legal concerns from Dykema Gossett and Miller Canfield are presented. Former Chief Justice of the Michigan Supreme Court Maura Corrigan has twice written with concerns, including a rebuttal to data presented by Child USA representative Marci Hamilton. Both *The Detroit News* and *Crain's Detroit Business* have opined against the retroactive legislation.

Thank you for your attentiveness to these and other concerns that may come forward in opposition to Senate Bill 872 and those bills that would retroactively remove government immunity.

May 9, 2018

HONORABLE MAURA D. CORRIGAN

April 18, 2018

VIA EMAIL

Representative Daire Rendon
Michigan House of Representatives
District 103
dairerendon@gmail.com

Representative Julie Alexander
Michigan House of Representatives
District 64
juliealexander064@gmail.com

Re: Senate Bills 871-879

Dear Representatives Rendon and Alexander:

I write in response to CHILD USA CEO, Marci Hamilton's letter of April 9, 2018. I ask that you share my response with your colleagues. While CHILD USA, Ms. Hamilton, and I are committed to reducing child abuse, I disagree with many of her claims of fact and law.

Contrary to Ms. Hamilton's suggestion, Michigan is a national leader in the criminal prosecution of sex offenders. A drastic expansion of Michigan's civil statutes of limitations is not necessary to punish criminals and protect their victims. The punishment of criminals occurs in our criminal courts, not civil courts. CHILD USA's own website lists Michigan's criminal statutes of limitations as among the "best" in the nation and the "worst for predators." For example, Michigan has no statute of limitations for first degree criminal sexual conduct, see MCL 767.24(1)(a). Michigan, thus, does not need an enormously lengthened civil statute of limitations to prosecute sexual predators.

Ms. Hamilton's statement that "Michigan has the single shortest civil SOL in the United States" is mistaken. Michigan's civil statute of limitations is in line with those found in other states. We have a two-year statute of limitations for general assault and a five-year statute for assault or battery by a person with whom the plaintiff lives or used to live. MCL 600.5805. Tennessee, for example, has a statute of limitations of just one year. Tenn Code 28-3-104. Ms. Hamilton may instead be referring to "minority tolling," which gives child victims extra time to file a lawsuit once they turn 18. Under Michigan law, a plaintiff has one year after turning 18 to sue even if the limitations period has otherwise already run out. MCL 600.5851(1). This is the same as Tennessee and longer than New York, which does not have a minority tolling rule *at all*. Tenn Code 28-1-106; NY Civil Prac Law § 215. If we set aside the seven outlier states that have no civil statute of limitations for child abuse, the national median tolling period is five years. So Michigan, while on the low end in this one category, is not out of step with the rest of the country.

I would support a five-year minority tolling provision for civil sexual abuse cases, as it is consistent with the law in many states. It should not be retroactive. Ms. Hamilton's suggestion

April 18, 2018

that it be extended to 48 years is troubling. It is not supported even by the articles she cites. Specifically, she includes a chart on the age when victims report child sex abuse, but the chart is deceptive. The only data points for which she provides citations are her claims that “up to 33%” of the victims of child sex abuse report in childhood and “25%-33%” never report.¹ She does not cite *any* authority for the claim that the median age to disclose is 48. Instead, she seems to be saying that the median age of *any* adult is 48 years, as that is the halfway point between the age of majority and average life expectancy. A meaningless statistic to say the least. Furthermore, Ms. Hamilton’s own numbers suggest that 58%-66% of child abuse victims would not benefit from *any* expansion of the statute of limitations, as they either report when they are still children or they never report at all.

The Senate’s proposal to move Michigan to the far end of the spectrum on civil statutes of limitations is not sound policy. We are not just talking about a short window to revive a small number of otherwise stale claims. We are also talking about a wholesale, perpetual change in the statute of limitations and governmental immunity that could have profound negative impacts in the future. It will entice attorneys to bring claims against employers and other entities, public and private, based on allegations of decades-old conduct, wherein the evidence necessary to mount a defense may be gone and the witnesses and alleged perpetrators may have moved on or passed away. Although Ms. Hamilton labels Senate Bills 871-879 as “modest,” they are not.

Ms. Hamilton cites a handful of states that temporarily revived expired statutes of limitations. These states’ laws are very different from those proposed here. Not one of those states also included a waiver of governmental immunity, as is proposed in Michigan. Indeed, Hawaii – which is on Ms. Hamilton’s list – explicitly *excluded* claims against the State or subdivisions of the State in its revival statute. 2012 Haw Sess Laws SB2588. She also claims that Massachusetts revived the limitations period up to age 53, but that change explicitly was *not retroactive*. 2014 Mass Acts 145, Sec 8. Reviving 20-year-old claims while simultaneously eliminating governmental immunity, as proposed, will provide ample opportunity for lawyers to file lawsuits, including frivolous lawsuits supported by little-to-no available evidence. For such claims against the State, local governments, and school districts, the financial impact of Senate Bills 871-879 will fall primarily on the State – and therefore Michigan’s taxpayers – not the perpetrators of sexual assault.

Ms. Hamilton also states, without citation to authority, that insurance “typically . . . covers half or more of the recovery.” How much is covered by the insurance industry will, of course, depend on the unknown particulars of decades-old contracts, including whether they apply retroactively. An enormous expansion of potential liability will undoubtedly prompt insurance carriers to fight harder, invoke exclusions more aggressively, and potentially stop covering altogether public entities and businesses for related conduct. Even if Ms. Hamilton is

¹ Ms. Hamilton’s citations are questionable at best. The article titled *Child Sexual Abuse Disclosure: What Practitioners Need to Know*, for example, does not conclude studies show that 28%-33% disclose during childhood, as she alleges. Instead, the article says “researchers have found that disclosure rates for children range from 24% to 96%.” https://www.d2l.org/wp.../10/ChildSexualAbuseDisclosurePaper_20160217_v.1.pdf at 2 (collecting studies).

HONORABLE MAURA D. CORRIGAN


April 18, 2018

correct that insurance carriers will cover approximately one half of payouts, the State, school districts, and local governments will still be exposed to untold liabilities.

Finally, Ms. Hamilton misstates the burden of proof in a civil case. Criminal cases and civil cases have very different burdens of proof. Ms. Hamilton says lawsuits based on decades-old conduct will not pose a problem because a victim has the burden of proving liability "beyond a preponderance of the evidence." This is incorrect. See *Vance v Terrazas*, 444 US 252, 253 (1980) (stating that proof "beyond a preponderance of the evidence" is required in criminal and involuntary commitment contexts, not civil contexts). To win, a civil plaintiff needs *no more than* a preponderance of the evidence – that is, a showing that it is more likely than not that the conduct occurred. Further, Ms. Hamilton incorrectly claims that "[w]ithout corroborating evidence, the case does not go forward." In fact, our Legislature has specifically established that even in *criminal* cases – where the burden of proof is the highest – the testimony of a CSC victim need not be corroborated for a prosecution to go forward. MCL 750.520h. No corroborating evidence is required in a civil case. Thus, a plaintiff's word *alone* – even if based on a decades-old memory – could be sufficient to bring a lawsuit under the proposed legislation.

There can be no question that the passage of Senate Bills 871-879 would expose private and public entities to a large number of new lawsuits based on old conduct. As I previously discussed, punishing sexual predators and protecting victims are vital obligations of our government, which I fully support. Making sweeping changes to longstanding laws, however, is fraught with unintended consequences. Thank you for your diligence and your service. I appreciate your consideration of my views. Please feel free to contact me should you have any follow up questions or comments.

Sincerely,


Honorable Maura D. Corrigan



For distribution – May 8, 2018

As a service to our members, MSAE aims to provide pertinent information regarding issues affecting the Michigan nonprofit sector. At the 2018 Legislative and Public Policy Conference, MSAE attempted to provide an open and meaningful dialogue on the issues surrounding changes to Michigan's sexual assault laws.

In the time following, several changes to these laws have been proposed which may significantly impact your organization. The introduced package of bills will seek to change important provisions to protect victims of sexual assault and prevent future sexual misconduct, including mandatory reporting of abuse allegations and stronger criminal penalties.

Although MSAE maintains its nonpartisan stance on policy issues, we are proud to serve as a resource for better understanding legislation which may affect your organization.

At this time, the [bill package](#) is currently being considered by the State House of Representatives, already having passed in the State Senate.

For an analysis of the proposed changes conducted by third- party sources, please access the following:

- [Issue Overview](#)
- [Dykema Gossett PLLC Compilation of Concerns](#)
- [Miller Canfield Analysis of Senate Bills](#)
- [Michigan Chamber of Commerce SB 872 Memorandum](#)
- [Letter from former Michigan Supreme Court Justice Maura Corrigan](#)

If you are concerned about this and would like to receive additional information, or would like for your organization to get engaged, please email us at info@msae.org. For assistance in contacting your House of Representatives member, click [here](#).

Thank you for your time.

From: Joan Gustafson <jgustafson@mnaonline.org>

Date: May 2, 2018 at 4:30:35 PM EDT

Subject: ACTION ALERT: Proposed Changes to MI's Sexual Assault Laws + Potential Impact to Your Organization

Public Policy Action Alert!

Proposed Changes to Michigan's Sexual Assault Laws and Potential Impact to Your Organization

Dear Nonprofit Colleagues:

In our ongoing effort to provide you with the information you need to make knowledgeable decisions, Michigan Nonprofit Association wants to make you aware of proposed legislation that will change Michigan's sexual assault laws.

The bills aim to change the laws following the Larry Nassar scandal and include a number of important provisions that will protect victims and prevent future sexual misconduct, including mandatory reporting of abuse allegations and stronger criminal penalties. One bill in the package, SB 872, would retroactively extend the statute of limitations for civil cases to 30 years or until a victim who was a minor turns 48 and cover nonprofits, units of government and businesses with a focus on those serving youth. A fiscal analysis of the bill package is available [here](#).

These bills are currently being considered by the State House of Representatives and have already passed the Senate. There may be unanticipated consequences if this legislation becomes law.

Questions to consider as you think about how this change in legislation may affect your work, now and in the future:

- What is the current state law on statute of limitations?
- Recognizing that my organization may not have employment records going back 30 years, what type of employment records should I re-create and maintain for the future?
- Recognizing that my organization may serve hundreds of youth in a year, what records should I maintain on the names of youth served?
- My organization has had insurance, but if this proposed legislation becomes law, what type of insurance do we need to have to cover abuse cases that may be raised retroactively and going forward?
- Related to insurance, the Board members of my organization have asked about coverage for them both as individuals and as a collective group. What type of insurance should we maintain to cover the Board?
- Volunteers play an instrumental role in our organization's ability to serve youth. What are the best practices in both recruiting, and maintaining volunteers? And how should we insure volunteers as well?

- Even if there is never a case of sexual conduct offense proposed, how is this legislation going to impact the ongoing cost of providing the needed services our clients, families and communities expect us to provide?

If you are concerned about these questions and the potential impact of the proposed legislation on your nonprofit and the services you provide, we encourage you to contact your House of Representatives member using this link

<http://www.house.mi.gov/mhrpublic/frmFindARep.aspx>.

Sincerely,

Donna Murray-Brown
President & CEO

[Forward this message to a friend](#)

[Keep up with the latest in Michigan's nonprofit sector by subscribing to MI Nonprofit News.](#)

The following analysis of Senate bills 872, 875, 876 and 877 (as passed by the Senate on Wednesday, March 14, 2018) was prepared by Dykema:

Summary

If enacted into law, these Senate passed bills will encourage the filing of a significant number of new civil damage cases within the next year against state public universities and Michigan's businesses, community and civic organizations, churches, schools and governments.

These new civil damage cases will increase litigation costs and may produce significant additional contingent liabilities and greater financial exposure for state public universities and Michigan's businesses, community and civic organizations, churches, schools and governments.

All governmental agencies will be required to defend against certain tort claims using a weakened, narrowed and untested governmental immunity statute that will increase the cost of litigation.

As of this date, no fiscal analysis has been conducted by the Senate to determine the scope of all business and government liabilities and financial exposure created by these Senate bills, or the financial impact the bills will have on the current year or next year's State budget.

If passed in their current form, these Senate bills will have a negative impact on some government credit ratings.

If passed in their current form, the cost to obtain insurance will substantially increase and the ability to purchase certain insurance coverage may be eliminated.

Retroactive provisions extending the statute of limitations and allowing for the filing of claims occurring more than 21 years ago are likely to be challenged in the courts further delaying implementation of this bill package.

Background

On Monday, February 27, 2018, a ten bill package (Senate bills 871 through 880) was introduced in the Michigan Senate. On March 1, 2018, the Senate Committee on Judiciary held a hearing and passed the bills. On March 14, 2018, the Senate passed the ten bill package with a number of amendments. Although amendments limited the scope and duration of the statute of limitation changes, the retroactivity provisions still remain in several bills. As of this date, the Senate Fiscal Agency has not provided any substantive analysis determining the potential liability or financial exposure of these bills. This document analyzes four bills as passed by the Senate – Senate bills 872, 875, 876 and 877.

Analysis

Civil Actions

SB 872: Senate bill 872 revises section 5805 of the Revised Judicature Act of 1961, MCL 600.5805, and creates a new ten (10) year statute of limitation for actions based on certain conduct that constitutes criminal sexual conduct ("CSC") under five different sections of the Michigan Penal Code [sections 520B (CSC -1st degree), 520C (CSC-2nd degree), 502D (CSC-3rd degree), 520E (CSC-4th degree) or 520G (Assault with intent to commit CSC), MCL 750.520B, 750.520C, 750.520D, 750.520E and 750.520G]. SB 872 permits a plaintiff to initiate a civil lawsuit for alleged conduct that violates any of these five CSC sections. In order to bring a complaint under revised section 5805, a plaintiff need only allege CSC that would be in violation of any of these five CSC sections. SB 872 expressly allows a plaintiff to bring an action based on CSC even if the alleged CSC was not previously reported or the defendant was not arrested, charged, prosecuted or convicted of CSC. As passed by the Senate, SB 872 does not contain a retroactivity provision for individuals over 18 years of age at the time of the CSC violation to bring a claim under section 5805.

SB 872 also creates a new section 5851B that extends the statute of limitations for persons who were minors¹ at the time of the alleged CSC by allowing those individuals to bring a civil action before they reach 48 years of age. Section 5851B includes a retroactivity provision allowing individuals who were minors at the time of the CSC to bring a claim within one year of the effective date of SB 872 if the claim occurred after December 31, 1996 and before 3 years before the effective date of when SB 872 becomes law. An individual would not be able to file a retroactive lawsuit within this one-year filing window under section 5851B if (i) the claim involved consensual conduct between the plaintiff who was at least 13 years of age but less than 16 years of age and a defendant whose was not more than 4 years older than that plaintiff; or (ii) the claim involved consensual conduct between the plaintiff who was 16 or 17 years of age and a defendant who did not have "custodial authority" over the plaintiff, as that term is defined in section 2 of the Sex Offenders Registration Act, MCL 28.722.

Notwithstanding the proposed changes made to SB 872, the bill would still have a significant financial impact on Michigan businesses, community/civic organizations, churches, schools and governments. If passed, SB 872 will result in an indeterminate number of new cases being filed for civil damages. These new cases will potentially expose all Michigan businesses, community/civic organizations, churches, schools and governments to additional litigation costs and potential monetary damages. Instead of a 3 year statute of limitations barring such claims, SB 872 allows the filing of a CSC claim accruing after December 31, 1996 but before 3 years after the effective date of when SB 872 becomes law. The one year filing deadline after the effective date of SB 872 will result in a undetermined number of new civil cases being filed. Without extensive research and analysis, it is not possible to estimate the number of potential cases, litigation costs associated with such cases, or the potential monetary damages that may be incurred by defendants.

¹ The term "minor" is not defined in Chapter 58 of the Revised Judicature Act.

Notice of Intent to File Claims Against the State: Court of Claims

SB 875: Senate bill 875 amends section 6431 of the Revised Judicature Act of 1961, MCL 600.6431, and changes the filing requirements for a person filing a claim of sexual misconduct that occurred when the person was younger than 18 years of age. SB 875 permits such persons to file the 1 year intent to file a claim ("NOI") in the Michigan Court of Claims against the state of Michigan or any of its departments, commissions, boards, institutions, arms or agencies (collectively "State") without signature or verification. In addition, such persons would not be required to file a NOI in the Court of Claims within 6 months for property damages or personal injury. Claims against the State involving sexual misconduct would include those under four Michigan Penal Code provisions [sections 136 (genital mutilation), 145A (accosting, enticing or soliciting indecency of a child), 145B (accosting, enticing or soliciting indecency of a child, repeat offenders) and 145C (child pornography), MCL 750.136, 750.145A, 750.145B and 750.145C] or the five CSC statutes noted above (collectively "Sexual Misconduct Claims"). A criminal conviction under any of these statutes would not be required in order to file. SB 875 also contains a retroactivity provision designed to eliminate the NOI for any Sexual Misconduct Claims filed on or after January 1, 1997, and allows such claims to be filed at any time after the event or events giving rise to the claims occurred. SB 875 would take effect ninety days after being enacted into law.

The bill would have a significant financial impact on the State. If passed, SB 875 would permit an indeterminate number of new cases to be filed against the State and executive branch departments. No part of State government would be immune from such claims. This will include alleged Sexual Misconduct Claims involving State employees and the State that occurred more than 21 years ago (i.e., after January 1, 1997). Since the bill eliminates the requirement for filing a NOI to file Sexual Misconduct Claims against the State, the State will be required to defend all potential Sexual Misconduct Claims when they are filed and without notice of such claims. Without extensive research and analysis, it is not possible to estimate the number of potential cases, litigation costs associated with such cases, or the potential monetary damages that may be incurred by the State.

Statute of Limitation For Claims Against State: Court of Claims

SB 876: Senate bill 876 amends section 6452, MCL 600.6452, of the Revised Judicature Act of 1961, by eliminating the 3 year statute of limitations for filing a claim in the Court of Claims or an authorized suit in federal court against the State, if the claim against the State involve Sexual Misconduct Claims committed against a person who was younger than 18 years of age. The bill also eliminates any limitation on actions contained under Chapter 58 of the Revised Judicature Act of 1961 if the claim against the State involves claims for sexual misconduct committed against a person who is younger than 18 years of age. SB 876 would permit the filing of a case against the State at any time if the claims involve Sexual Misconduct Claims against a person who was younger than 18 years of age when the claims occurred. The claims would not have to result in a criminal conviction. SB 876 also contains a retroactivity provision back to January 1, 1993 for Sexual Misconduct Claims against the State if the claims

involve a person who was younger than 18 years of age when the claims occurred. SB 876 would take effect ninety days after being enacted into law.

The bill would have a significant financial impact on the State. If passed, SB 876 would permit an indeterminate number of new cases to be filed against the State. No part of State government would be immune from such claims. Since the bill extends the time period for claims back to January 1, 1997, the State will be required to defend all Sexual Misconduct Claims going back over 21 years. Without extensive research and analysis, it is not possible to estimate the number of potential cases, litigation costs associated with such cases, or the potential monetary damages that may be incurred by the State.

Governmental Immunity Act

SB 877: Senate bill 877 amends the Governmental Immunity Act, MCL 691.1401 et seq. ("Act"), by adding a new section to the Act (section 7D). Section 7D expressly eliminates governmental immunity for any member, officer, employee, or agent of a governmental agency (which means the State and any political subdivision of the State), or a volunteer acting on behalf of the governmental agency, who engages in acts covered by the sexual misconduct or CSC statutes noted above, while in the course of employment or service or while acting on the governmental agency's behalf. In addition, SB 877 provides that the governmental agency is not immune from tort liability for Sexual Misconduct Claims engaged in by a member, officer, employee, or agency of the governmental agency during the course of employment or services or while acting on the governmental agency's behalf. SB 877 is also applied retroactively for Sexual Misconduct Claims that occur after December 31, 1996. However, unlike SB 875 and SB 876, the retroactivity provision is not limited to claims by an individual younger than 18 years of age. Coupled with the changes in SB 872, SB 875 and SB 876, enactment of SB 877 into law would mean there is a different governmental agency immunity defense under the Act for any Sexual Misconduct Claims committed by their employees, agents or volunteers in the course of employment, service or while acting on the governmental agency's behalf.

As passed, SB 877 creates a different governmental immunity defense for the State and all governmental agencies sued for Sexual Misconduct Claims. By definition, governmental employee conduct that violates the sexual misconduct or CSC statutes would be illegal acts that are outside the scope of a governmental employee's authority and such conduct would not be immune from liability. By comparison, however, the governmental agency did not commit the Sexual Misconduct Claims. Under current law, a governmental agency would be afforded an opportunity to raise an immunity defense to Sexual Misconduct Claims and that immunity defense would be evaluated under the Act's well-established governmental immunity standards. SB 877 weakens the State's ability to defend against Sexual Misconduct Claims by changing the governmental immunity standards. SB 877 would take effect ninety days after being enacted into law.

SB 877 provides that the governmental agency would not be immune from tort liability for Sexual Misconduct Claims if either (i) the governmental agency was negligent in the hiring, supervision, or training of the governmental employee or agent; or (ii) the governmental agency knew or should have known of the sexual misconduct and failed to report the sexual misconduct

to an appropriate law enforcement agency. The amendment does not define “negligent” and proposes a lesser standard than the “gross negligence” definition under section 7 of the Act. There is no standard for evaluating how a governmental agency “knew or should have known” that a governmental employee committed acts leading to Sexual Misconduct Claims. Most importantly, however, SB 877 creates a weaker governmental immunity defense under the Act for governmental agencies sued for Sexual Misconduct Claims.

SB 877 would have a significant financial impact on all governmental agencies across the State by allowing an indeterminate number of new cases to proceed against governmental agencies. All governmental agencies will be required to defend potential Sexual Misconduct Claims using a weakened, narrowed and untested governmental immunity statute. The proposed retroactivity clause applies to all alleged Sexual Misconduct Claims that occur after December 31, 1996 and is not limited to those claims by individuals younger than 18 years of age. Without extensive research and analysis, it is not possible to estimate the number of potential cases, litigation costs associated with such cases, or the potential monetary damages that may be incurred by the State and all governmental agencies.

Founded in 1852
by Sidney Davy Miller



SCOTT R. ELDRIDGE
TEL (517) 483-4918
FAX (517) 374-6304
E-MAIL: eldridge@millercanfield.com

Miller, Canfield, Paddock and Stone, P.L.C.
One Michigan Avenue, Suite 900
Lansing, Michigan 48933
TEL (517) 487-2070
FAX (517) 374-6304
www.millercanfield.com

MICHIGAN: Ann Arbor
Detroit • Grand Rapids
Kalamazoo • Lansing • Troy

FLORIDA: Tampa

ILLINOIS: Chicago

NEW YORK: New York

CANADA: Windsor

CHINA: Shanghai

MEXICO: Monterrey

POLAND: Gdynia
Warsaw • Wrocław

March 16, 2018

ANALYSIS OF SENATE BILLS REGARDING SEXUAL MISCONDUCT

On March 14, 2018, the Michigan Senate passed a package of bills regarding sexual misconduct ("the Bills") that will have a significant negative impact on Michigan's legal and business climate. The Bills will impose *retroactive liability* on every business and local government in this State for a period of at least *10 years* and up to potentially 48 years. This memorandum supplements our March 12, 2018 analysis of the original versions of the Bills. Although some of the problematic language in the original versions has been pared down slightly in the versions passed by the Senate, all of our concerns with the legislation remain. When Minnesota recently extended liability retroactively for just three years, it caused considerable litigation and bankrupted entities. The versions passed by the Senate subject Michigan to a similar experience. In short, these Bills: (a) create a windfall to trial attorneys; (b) expose both public and all private entities in Michigan to significant unanticipated and uninsured financial liability; and (c) fail to adequately detect, prevent, and punish sexual predators.

Senate Bill Nos. 872 and 876: Extending the Civil Period of Limitations for Criminal Sexual Conduct

Senate Bill Nos. 872 and 876 seek to amend MCL 600.5805 and MCL 600.6452 to provide that for "an action based on conduct that constitutes criminal sexual conduct," even though it is unnecessary that a criminal prosecution has been brought, or conviction secured, as a result of that conduct, the civil period of limitations is extended to 10 years or, in the case of a survivor who is a minor at the time of the conduct, any time until that person reaches 48. The amendment is to apply retroactively to January 1, 1997.

The most significant change these Bills impose on every business and government entity in Michigan is *retroactive liability* for claims that might go back as far as 1997. Going forward, plaintiffs who were minors at the time of alleged abuse can file suit at any time before they reach the age of 48, meaning that the statute of limitations for minor victims can be as much as 48 years. These Bills *revive* potential claims that are now barred by law. None of this retroactive liability was anticipated and almost none will have been insured. One or two lawsuits based on old claims can bankrupt a small business or a charity, as happened in Minnesota, where a modest, three-year waiver of its statute of limitations resulted in hundreds of new claimants filing lawsuits.

A lengthy civil period of limitations could have an adverse effect on promptly detecting and punishing a sexual predator because a delay in bringing an action could give a predator the opportunity to abuse even more people. Senate Bill Nos. 872 and 876, as passed, permit sexual abuse to continue for at least 10 years and as much as 48 years before an action is brought to challenge a predator. And when litigated many years after the event, evidence, memories, and witnesses are likely to be unavailable.

Although there has been no determinate fiscal analysis of the Bills, the financial impact on the State – for both public and private entities – could be staggering. Indeed, the non-partisan, Senate Fiscal Analysis warns that SB 872, alone, “would have an indeterminate fiscal impact on State and local government,” and “State and local units of government could face indeterminate liability in the form of judgements, settlements, and litigation costs for the actions of their employees going back [decades], if governmental immunity did not apply.” The same Senate Fiscal Analysis recognizes the uncertainty these Bills create for local units of government: “The ability of any particular local unit of government to absorb the cost of a judgment would depend upon the severity of the judgment and the financial health of the local unit of government.”

All Michigan entities – not just public universities or institutions – will be subject to claims going back at least 10 years and as much as 48 years. *Every* private entity, including especially small businesses and charities, will face potential claims and increased insurance difficulties. The entities made most vulnerable by these Bills include:

- Non-profit organizations
- Youth camps
- Youth recreational entities
- Daycare facilities
- Nursing homes
- Small businesses

Municipalities, counties, school districts, teachers, community education centers, 4H clubs, foster care programs, and many other units at all levels of government will likewise face potential claims and increased insurance difficulties.

In short, Senate Bills No. 872 and 876 create significant new retroactive liability for private and public entities. Senate Bill Nos. 872 and 876 are also subject to constitutional challenge because they impose retroactive liability. Although, as compared to the original version of the Bills, the Senate has made some attempt to limit the applicability of the ballooned statute of limitations to a more discrete number of people retroactively, the Bills as passed still give plaintiffs up to 48 years to file a lawsuit. The Bills also contain new, confusing carve-outs related to “consensual” sexual conduct with a minor that does not adequately explain its intersection with Michigan’s criminal sexual conduct laws, which will only serve to obscure

Michigan's previously-clear statute of limitations and, therefore, lead to more litigation. Further, because extending the period of limitations will permit sexual abuse to continue for more than 10 years and as much as 48 years, the Bills seem to frustrate the stated goal of reducing sexual assaults.

Senate Bill No. 877: Eliminates Governmental Immunity

Senate Bill No. 877 seeks to amend the Governmental Tort Liability Act ("GTLA") to provide that the State and State employees are not immune under the GTLA where the employee engages in sexual misconduct "during the course of employment or service or while acting on behalf of the governmental agency." The amendment would be retroactively applied to acts occurring after December 31, 1996.

Senate Bill No. 877 does not provide additional protections to victims of sexual abuse. As passed, Senate Bill No. 877 does not impose any penalty on those who commit sex crimes. Under current well-established law, an employee who commits a crime, including criminal sexual conduct, is not acting within the course of employment or on behalf of the State and the employee has no immunity. Accordingly, Senate Bill No. 877 would only apply in instances where the State *directed* the employee to engage in sexual misconduct.

Governmental immunity protects taxpayers who ultimately must pay judgments against government entities. Assuming Senate Bill No. 877 is revised or interpreted as eliminating governmental immunity for governmental entities that happen to have employed a criminal engaged in sexual misconduct, *this Bill attempts to make governmental entities liable for the first time for crimes committed by employees.* This change could have a staggering fiscal impact at all levels of State government. With the proposed retroactive amendment to the GTLA, coupled with a retroactive 10-year period of limitations (and up to 48-year statute of limitation for minor victims), the State could become liable for potentially billions of dollars in claims, including claims arising from operation of its prison system, foster care, and other programs. Similarly, a local school district, for example, may be exposed to great financial liability if just one or two lawsuits are filed for inappropriate teacher sexual contact with a student. The liability for such claims may extend all the way back to January 1, 1997. And, under Senate Bill No. 877, the period of exposure for all governmental entities to this liability will become one of the longest in the nation – a full decade for adult victims, as much as 48 years for minor victims going forward. As with Senate Bill Nos. 872 and 876, the imposition of retroactive liability in Senate Bill No. 877 is subject to constitutional challenge.

Senate Bill No. 875: Anonymity in Notices of Intent

Senate Bill No. 875 seeks to amend the Court of Claims Act, MCL 600.6431, to provide that for claims for "sexual misconduct committed against an individual who is less than 18 years of age," the required notice of intent (1) may be filed at any time, (2) does not need to identify the claimant, and (3) does not need to be signed by the claimant and verified. The amendment is to apply retroactively to January 1, 1997.

Senate Bill No. 875 is designed to assist plaintiffs' attorneys in avoiding malpractice claims for failing to follow longstanding notice of intent requirements. Failure to follow the basic notice of intent requirements in the Court of Claims Act, which Michigan courts have construed strictly, may amount to legal malpractice. Senate Bill No. 875 seeks to retroactively cure the malpractice.

Moreover, permitting anonymity in notices of intent will have an adverse effect on actually preventing and punishing sexual predators. The purpose of a notice of intent is to permit all public entities within the State – not just universities – to investigate a claim and take appropriate action. By leaving out the most essential detail, the claimant's identity, the State will be unable to fully investigate a claim and, therefore, cannot fully and timely prevent, detect, and punish sexual predators. The retroactive change will also make this bill subject to legal challenge.

Senate Bill Nos. 873 and 874: Mandatory Reporting and Increasing Criminal Penalties for Mandatory Reporters

Senate Bill Nos. 873 and 874 seek to (1) amend Michigan's Child Protection Law to provide that coaches, assistant coaches, and athletic trainers are mandatory reporters of child abuse; and (2) increase the penalty for failing to report child abuse.

The goal of increasing the number of persons required to report sex crimes against children is a laudable one. But the manner in which these Senate Bills attempt to do so will not help prevent or detect the type of abuse at which the Bills are aimed. Michigan's Child Protection Law, MCL 722.622(g), defines "child abuse" as "harm or threatened harm to a child's health or welfare that occurs through non-accidental physical or mental injury, sexual abuse, sexual exploitation, or maltreatment, by a parent, legal guardian, or any other person responsible for the child's health or welfare or by a teacher, a teacher's aide, or member of the clergy." Because Nassar was not a parent, legal guardian, teacher, teacher's aide, or member of the clergy, merely creating more mandatory reporters and increasing the criminal penalties for such reporters does nothing to address the conduct that motivates these Bills. *Consequently, different legislative action is required if the goal is to ensure that sex crimes against children are reported to law enforcement agencies.*

Conclusion

The Senate Bills create significant new liability for both private and public entities. While the Bills create liability for all, the real beneficiaries of the Bills are trial attorneys as the Bills are not well drafted to help detect and prevent sexual predators. If passed, the Bills will be subject to legal challenge, including whether some provisions amount to unconstitutional *ex post facto* laws, which criminalize and punish past conduct and are prohibited under both the Michigan and federal constitutions.

CRAIN'S DETROIT BUSINESS

Detroit and Southeast Michigan's premier business news and information website

Originally Published: April 1, 2018 12:16 AM Modified: A day ago

Editorial: Aim for thoughtful bills following Nassar

By Crain's Detroit Business

In the post-Larry Nassar world, Michigan lawmakers want to set things right for sexual misconduct victims as well as punish abusers and penalize institutions that should have prevented the abuse in the first place.

So there is much to like in a package of bills passed by the state Senate that are pending in the House, including mandatory reporting of abuse allegations and stronger criminal penalties.

But we differ with the bills that would alter Michigan's civil liability rules by extending the period in which civil lawsuits can be filed.

The bills would apply to businesses, nonprofits, governments and religious organizations and would allow claims to be filed for acts that date to 1997. This could unleash a flurry of civil suits on old claims for which no criminal charges were ever filed. It could also invite new claims from people who are alleging acts that took place years ago but they never stepped forward until now (possibly prompted by trial lawyers' ads that will undoubtedly flood the airwaves.)

The Michigan Chamber of Commerce notes it would be difficult for many organizations to defend themselves because records — such as personnel files or other evidence — may have been purged.

The bills have not prompted a huge outcry from business because of the optics — who wants to be positioned as being against the victims in the horrific MSU assault case?

You can be for the victims and thoughtful legislation.

Meanwhile, MSU and lawyers representing the more than 200 Nassar victims are proceeding with mediation under Layn Phillips, a former federal judge in Oklahoma. Mediation promises speedier settlements. In the end, would that serve victims better than a lawsuit that drags on for years?

Use of editorial content without permission is strictly prohibited. All rights Reserved 2018

www.crainsdetroit.com

HONORABLE MAURA D. CORRIGAN

March 12, 2018

Re: Senate Bills 871-879

Dear Distinguished Legislators:

I write as a former Chief Justice of the Supreme Court and Director of the Department of Human Services regarding Senate Bills 871-879, recently introduced by Senator Margaret O'Brien. The Bills, as currently worded, will have lasting negative consequences for public and private entities across our State. As currently drafted, these bills undermine well-established jurisprudential rules that serve our State's commitment to just and speedy criminal and civil legal proceedings.

I urge you to take the time to get this right.

Everyone is aware of the horrible crimes that Dr. Nassar committed. I urge the Michigan Legislature, however, to allow interested parties to testify about the impact of these Bills and conduct an exacting review of them – Bills which were introduced in committee and passed on the same day after less than two hours of testimony.

My concerns about these Bills are based, not only by my twelve years as a Justice of the Michigan Supreme Court, including four as Chief Justice, but as an advocate for children's rights and child protective services. Thus, I wholeheartedly support efforts to create additional protections for victims of sexual abuse and punish those who commit abhorrent acts of sexual misconduct. For that reason, I applaud the proposal's expansion of the mandatory reporter provisions on a prospective basis.

As a longtime jurist, however, I support careful deliberation that these proposed changes to Michigan's law deserve. Although each proposal requires exacting review, I highlight here the more harmful portions. First, the proposal would retroactively extend the civil period of limitations to 30 years. This would be one of the longest civil statute of limitations in the United States. This would make Michigan an extreme outlier. Statutes of limitations, as our Supreme Court has explained, serve important policy interests, such as: to encourage plaintiffs to pursue their rights diligently and within a reasonable time so that the opposing party has a fair opportunity to defend; to relieve already congested court systems from dealing with "stale" claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured; and to protect people and entities from protracted fear of litigation. Permitting stale claims to languish for years – or, as proposed, for decades – would ill-serve Michigan's citizens and their judicial system.

Retroactively extending the statute of limitations and retroactively removing governmental immunity will expose the State to *billions* of dollars in liabilities for claims dating back 30 years. The State operates prison systems, parks and recreation programs and, in DHHS, foster care programs. Thousands of persons have moved through programs over the last 30 years. The State will not be able to find witnesses to defend claims for so long a period as these

HONORABLE MAURA D. CORRIGAN

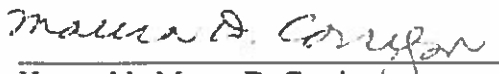
March 12, 2018

bills would permit. This new liability will affect the State's bond rating and probably that of county and municipal entities because these bills similarly affect them.

But as troubling as is this new liability for governmental entities, *every* business in Michigan, including small businesses and charities would experience adverse effects. Exposing every business in the State to this new unexpected (and probably uninsured) liability is unjustifiable, no matter how noble the goals. Minnesota learned this the hard way when it retroactively extended its statute of limitations for sexual assaults for just three years. Michigan should learn from Minnesota and not replicate their experience.

Finally, these Senate Bills create serious constitutional issues that will be litigated for years to come. In short, while I commend the goal, the Legislature should pause to deliberate and consider certain profoundly negative implications of these Senate Bills as currently drafted. These bills can be reworked to avoid constitutional defects and achieve just results for victims. I would be happy to offer testimony or other assistance to address the concern about sexual assaults without bankrupting the State and its many businesses and precipitating years of litigation in which lawyers, not victims, will become the principal beneficiaries.

Sincerely,


Honorable Maura D. Corrigan

Date: March 13, 2018

**To: Honorable Members of the Michigan Senate
Honorable Members of the Michigan House of Representatives**

**From: Don Wotruba, Michigan Association of School Boards
Chris Wigent, Michigan Association of School Administrators
Mike Hansen, Michigan Community College Association
Steve Currie, Michigan Association of Counties
Larry Merrill, Michigan Townships Association
Dan Gilmartin, Michigan Municipal League**

On February 27, 2018, a package of bills (SB 871-880) was introduced in the Michigan Senate to address issues pertaining to criminal sexual conduct and sexual misconduct. These bills are far ranging and impact private employers, state government, local governments and educational institutions. Much discussion has been had on the impact the package will have on state government and higher education, but little has been said about the broader impact on others.

K12s, community colleges and local units of government are committed to the safety of each of our constituencies and to being held accountable and holding people accountable should any misconduct happen amongst our members. In fact, each of our members are locally elected and are expected to bring about a level of personal accountability and ensure local tax dollars are spent wisely.

With this being said, our joint memberships are concerned that this package of bills is moving through the process with such expediency that it is difficult to ascertain the impact it will have on all the separate entities involved in the legislation. To our knowledge, no legislative analysis has been completed that fully explains how this package will affect different levels of government and private entities.

We ask that any vote on these bills be delayed until legislators have had a chance to understand the full impact of the package as it is currently drafted. We fully understand your desire to act on this issue, we only ask that you postpone such action until you are comfortable the package accomplishes what you want while not creating unintended consequences that were missed in the process.

Thank you for your consideration.



MEMORANDUM

To: Members of the Michigan Senate

From: The Michigan Chamber of Commerce

Subject: Senate Bill 872

Date: March 13, 2018

This memorandum is to express the Michigan Chamber's concerns regarding Senate Bill 872, legislation to create a new thirty (30) year statute of limitations for actions based on certain actions that constitutes criminal sexual conduct.

While the legislation is intended to address the atrocities and aftermath of the Larry Nassar situation, we are concerned that the bills go much further and would subject Michigan businesses and other entities not related to the Nassar situation to an indeterminate number of lawsuits and civil damages. Specifically, we are concerned that the records (e.g., personnel files, witnesses and other evidentiary records) would no longer exist for a full and transparent adjudication.

While we agree that all victims must be protected and the legislature should research every available option to improve public policy in this area, we are concerned that numerous legal analyses point to years of legal limbo to determined if SB 872 is even constitutional. We urge you to take the time to fully vet SB 872 so, upon enactment, Michigan citizens can be confident that it's the right policy for Michigan.

Please let us know if you have any questions.



**MICHIGAN
CATHOLIC
CONFERENCE**

News Release

For Immediate Release
13 March 2018

Contact: Dave Maluchnik
Vice President, Communications
dmaluchnik@micatholic.org
Mobile: (517) 247-9623

Catholic Conference Urges Senate Passage of Key Sexual Abuse Prevention Legislation *Retroactive Civil Legislation Remains a Critical Concern*

(Lansing) – Michigan Catholic Conference, the official public policy voice of the Catholic Church in this state, tonight is calling on the Michigan Senate to pass components of a legislative package that seek to address child sexual abuse in society.

“The abuse of children, especially sexual abuse, is a stain on our nation’s collective soul. It is heartbreaking and disgusting, yet regrettably, it is present in every facet of society: families, schools, civic organizations, correctional facilities for juveniles, and even churches. Within this reality, and in the midst of an understandably sensitive environment, good public policy must be made as it affects citizens of this state both now and into the future.

“In order to address the scourge of sexual abuse in our society, Michigan Catholic Conference encourages the Michigan Senate to pass Senate Bills 871, 873, 874, 878, 879 and 880. These measures, which would prospectively expand the criminal statute of limitations, expand the pool of mandatory reporters, enhance penalties against repeat abusers, and lengthen the sentences for those who deal in the heinous practice of child pornography, will help to create safe environments while protecting children today and years to come.

“In recent days, several prominent organizations that represent businesses, local governments, civic organizations, public schools, and institutions of higher education have urged the Michigan Senate to evaluate in a more deliberative manner legislation that would retroactively reopen the civil statute of limitations. Michigan Catholic Conference opposes retroactively amending the civil statute of limitations. As publicly stated this week by leading academic and legal scholars, both in Michigan and from outside the state, civil retroactivity would put institutions and employers in the impossible position of defending claims that are decades old. Civil retroactivity would hold the people and taxpayers who support today’s churches, schools, civic organizations, and local and state government financially accountable for allegations from decades past.

“Over the past fifteen years, the Catholic Church has talked with survivors, committed to protecting children by creating safe environments, required background checks and fingerprints of both volunteers and employees, and required ongoing awareness and education about abuse and protecting children. Our unwavering support for healing assistance and counseling will continue regardless of when a survivor’s claim is confirmed.

“With this experience, and in order to ensure strong protections for our children, Michigan Catholic Conference urges the Michigan Senate to send over to the House of Representatives Senate Bills 871, 873, 874, 878, 879, and 880.”

###



**MICHIGAN
CATHOLIC**
CONFERENCE

News Release

For Immediate Release
16 April 2018

Contact: Tom Hickson
Vice President, Public Policy
thickson@micatholic.org
Mobile: (517) 712-4911

Catholic Conference Offers Support for House Child Protection Legislation

(Lansing) – Michigan Catholic Conference (MCC) Vice President for Public Policy Tom Hickson offered the following comments today supporting bipartisan legislation introduced last week in the Michigan House of Representatives to protect children and others from abuse:

“The Michigan House has been engaged in developing positive, forward-looking solutions to combat the appalling and terrible presence of sexual abuse in society. For these efforts thus far to address the scourge of abuse Michigan Catholic Conference is grateful. We look forward to supporting measures in committee intended to protect children, create safe environments, and produce structures and policies to ensure every person feels safe both in public and private environments.”

House Bills 5783-5800 are scheduled for discussion beginning this week in the House Law and Justice Committee.

Michigan Catholic Conference is the official public policy voice of the Catholic Church in this state.

###



Content provided by MIRS News.
Visit us on the web at www.mirsnews.com.

◀ Wednesday, February 28, 2018 ▶

MI Legal Expert: Nassar Legislation Could Be Unconstitutional

A long-time Lansing attorney who sits on the State Bar Public Policy Committee and chairs the Michigan Law Revision Commission is suggesting the brakes be tapped on a legislative package unveiled Monday in response to the Dr. Larry **NASSAR** scandal. "This package has a lot of problems," Richard **McLELLAN** told *MIRS*. "It appears in some cases to be unconstitutional and should get a full vetting over the next few months."

McLellan's comments echoed some of those raised by the American Civil Liberties Union during Tuesday's Senate Judiciary Committee meeting (See ["Sexual Abuse Survivor Bills Move To Senate Floor."](#) 2/27/18).

McLellan acknowledged the terrible nature of the Nassar crimes, but warns that components of the package could be argued to be "ex post facto" laws and change long-standing traditions that are a part of the country's legal system for a reason.

For example, 🐾 [SB 0872](#), sponsored by Sen. David [KNEZEK](#) (D-Dearborn Heights) would retroactively change the statute of limitations for civil suits arising out of alleged conduct that could be criminal sexual conduct and allow for recovery of damages for events that occurred after Dec. 31, 1992.

"Thirty years to bring an action?" asked McLellan. "Do you remember what you did 30 years ago? If someone accused you of something from 30 years ago, would you be able to defend yourself?"

🐾 [SB 0871](#), sponsored by Sen. Margaret **O'BRIEN** (R-Portage), would allow for a change in the statute of limitations for second degree criminal sexual conduct against an individual under the age of 18 to a period of 30 years, or to the alleged victim's 48th birthday whichever is later.

Under the bill, there would be no statute of limitations for such crimes where there is DNA evidence - raising it to the same level as murder or first-degree criminal sexual conduct.

McLellan contends the state's constitution specifically bars the enactment of such ex post facto laws.

That provision is contained in Article 1, Section 10 of the Michigan Constitution the ban on ex post facto laws is also contained in the U.S. Constitution.

Ex post facto laws retroactively change the legal consequences of actions that were committed, or relationships that existed, before the enactment of the law.

Beyond the ex post facto question, McLellan argued that statutes of limitations are part of the legal system for a valid reason.

"It's historically a recognition that there has to be some sort of limit to when you can go back and be charged with some infraction of the law with the exception of crimes that have a penalty of life," he said. "Yeah, it does sort of -- quote unquote -- let people get off, but we've lived with those [consequences] for years and years and I think they're valid and they have an historical meaning."

He argued if you're a defendant charged with a crime "many, many years later," it's hard to defend yourself.

"Witnesses go away, it's hard to prosecute too, but statutes of limitations have been around for hundreds of years, they've not been a particular problem," he added. "I don't think it's necessarily a good idea."



Content provided by MIRS News.
Visit us on the web at www.mirsnews.com.

National Scholar: Nassar Bills Would Create Stream-Of-Impossible To Defend Cases

◀ Monday, March 12, 2018

The Dr. Larry **NASSAR** scandal response package would make "dangerous changes to state law" by enacting "absurdly too long" statutes of limitations that would create a stream of cases that would be "impossible to defend," according to the vice president of the American Law Institute.

Speaking to *MIRS* the day before the Senate is slated to begin work on 10 bills dealing with older claims of sexual assault against children, University of Virginia Law School professor Douglas **LAYCOCK** raised questions about the cornerstone of the package -- allowing victims to go after sexual assailants in civil court until 30 years after the alleged incident or until the victim turns 48.

The current statute of limitations is within 10 years after the offense is committed or by the victim's 21st birthday, whichever is later.

"The bills would create a stream of cases that are impossible to try, and impossible to defend," Laycock warned. "All the plaintiffs would win, true or false, largely by default."

The comments come the same day the state's 15 universities asked the Senate to delay passage of the package, citing a "profound impact" if changes are not made. The letter does not address the concern that the universities might have regarding the potential long-term financial exposure the schools could face if potential abused students are given more time to file a lawsuit for the alleged misconduct. As with the ACLU and Michigan Catholic Conference, the Michigan Association of State Universities (MASU) is questioning the retroactive nature of some of the bills, which they say could result in a "significant number" of legal actions impacting "schools, churches, government and organizations."

Sen. Margaret **O'BRIEN** (R-Portage), the shepherd of the bills, said she is "comfortable" with the constitutionality of the package and has questioned whether the ACLU has read the bills (See "**O'Brien Defends Constitutionality Of Sex Assault Package**," 3/8/18).

"We feel the Constitution is very clear and we can do civil retroactivity, but the Constitution does not allow for criminal retroactivity," O'Brien said last week. "We feel very confident where we're at. We are making some changes that some different stakeholders have offered that we think strength victims' rights and provide a much clearer path."

Laycock is the First Vice President of the American Law Institute, one of the nation's leading independent organizations of lawyers and judges producing scholarly work to clarify, modernize and improve the nation's laws. It was formed in 1923.

Laycock who's taught and written on the law of religious liberty and the law of remedies for four decades at the University of Chicago, University of Texas and the University of Michigan Law schools, as well as at Virginia, contends the bills will generate a large number of suits.

Laycock was one of a number of law professors and experts *MIRS* reached out to comment on legislation introduced in the last two weeks in response to the Nassar scandal.

Michigan Law Revision Commission Chair Richard **McLELLAN** pointed out two weeks ago that the

retroactive look back bill could well violate the bans in the U.S. Constitution and Michigan Constitution against the adoption of *ex post facto* laws (See "[MI Legal Expert: Nassar Legislation Could Be Unconstitutional](#)," 2/28/18).

That package includes: 🐾 **SB 0872** sponsored by Sen. David **KNEZEK** (D-Dearborn Heights) that would change the statute of limitations for civil suits arising out of alleged conduct that could be criminal sexual conduct and allow for recovery of damages for events that occurred after Dec. 31, 1992.

O'Brien's 🐾 **SB 0871** would change the statute of limitations for second degree criminal sexual conduct against an individual under the age of 18 to a period of 30 years, or to the alleged victim's 48th birthday, which ever is later.

To illustrate his concerns, Laycock, who's served as lead counsel in six cases argued before the U.S. Supreme Court, offered up a hypothetical example of an abuse allegation made against a reverend.

"So, suppose a middle-aged plaintiff files suit and says '30 years ago, when I was 15, Reverend X molested me in the church, and that incident caused me to suffer various emotional and psychological damages,'" said Laycock.

He noted whoever supervised Reverend X may be dead, or senile. Reverend X himself may be dead or senile. The church secretary is long gone with no forwarding address. Much of the membership of the church has turned over. There may be no remaining witnesses of any kind except the plaintiff.

"And if we can find any of those witnesses, they aren't likely to remember anything after 30 years. If their suspicions were aroused at the time, they may remember. But if not -- if they never saw anything suspicious -- why should they remember anything about the comings and goings of a particular teenager 30 years ago, and whether he was ever alone with Reverend X in the church at the times he said he was?"

If those around 30 years ago don't remember anything, Laycock, who's represented both sides of abuse allegations contends "Reverend X has little chance of finding any witness who can help corroborate his story, and the more completely innocent he is, the less chance he has.

So, in many of these cases, the plaintiff will be the only witness. And he will be free to say anything he wants, without fear of contradiction," he added.

The U of V law professor notes a "fair number" of plaintiffs that bring forward allegations under the extended Statute of Limitations "will be telling the truth, but we have no good way to know which ones.

"At least a few of them will be total frauds, just making it up and trying to collect a settlement," Laycock said of civil suits. "Another large number of them will be telling the truth as they remember it, but their memory will no longer be accurate."

Beyond proving or disproving what may or may not have happened in the hypothetical church, Laycock said the 30-year statute of limitations also makes determining "damages" all but impossible.

"The harm that plaintiffs claim in these cases -- depression, marital difficulties are common allegations -- are very widespread in the population," he points out. "Most cases were not caused by sexual abuse. Causation is hard to figure out in the best of circumstances. Causation from 30 years ago is nearly impossible."



Content provided by MIRS News.
Visit us on the web at www.mirsnews.com.

QUOTE OF THE DAY

"The bills would create a stream of cases that are impossible to try, and impossible to defend. All the plaintiffs would win, true or false, largely by default."

- Professor Douglas **LAYCOCK**, law professor at the University of Virginia and Vice President the American Law Institute - a leading organization of lawyers and judges writing scholarly reviews and articles about the nation's judicial system. Laycock was referring to pending legislation offered up in response to the Dr. Larry **NASSAR** scandal.

. MIRS Capitol Capsule Headlines

National Scholar: Nassar Bills Would Create Stream-Of-Impossible To Defend Cases

The Dr. Larry **NASSAR** scandal response package would make "dangerous changes to state law" by enacting "absurdly too long" statutes of limitations that would create a stream of cases that would be "impossible to defend," according to the vice president of the American Law Institute.

Speaking to *MIRS* the day before the Senate is slated to begin work on 10 bills dealing with older claims of sexual assault against children, University of Virginia Law School professor Douglas **LAYCOCK** raised questions about the cornerstone of the package -- allowing victims to go after sexual assailants in civil court until 30 years after the alleged incident or until the victim turns 48.

The current statute of limitations is within 10 years after the offense is committed or by the victim's 21st birthday, whichever is later.

"The bills would create a stream of cases that are impossible to try, and impossible to defend," Laycock warned. "All the plaintiffs would win, true or false, largely by default."

The comments come the same day the state's 15 universities asked the Senate to delay passage of the package, citing a "profound impact" if changes are not made. The letter does not address the concern that the universities might have regarding the potential long-term financial exposure the schools could face if potential abused students are given more time to file a lawsuit for the alleged misconduct. As with the ACLU and Michigan Catholic Conference, the Michigan Association of State Universities (MASU) is questioning the retroactive nature of some of the bills, which they say could result in a "significant number" of legal actions impacting "schools, churches, government and organizations."

Sen. Margaret **O'BRIEN** (R-Portage), the shepherd of the bills, said she is "comfortable" with the constitutionality of the package and has questioned whether the ACLU has read the bills (See "**O'Brien Defends Constitutionality Of Sex Assault Package**," 3/8/18).

"We feel the Constitution is very clear and we can do civil retroactivity, but the Constitution does not allow for criminal retroactivity," O'Brien said last week. "We feel very confident where we're at. We are making some changes that some different stakeholders have offered that we think strength victims'

rights and provide a much clearer path."

Laycock is the First Vice President of the American Law Institute, one of the nation's leading independent organizations of lawyers and judges producing scholarly work to clarify, modernize and improve the nation's laws. It was formed in 1923.

Laycock who's taught and written on the law of religious liberty and the law of remedies for four decades at the University of Chicago, University of Texas and the University of Michigan Law schools, as well as at Virginia, contends the bills will generate a large number of suits.

Laycock was one of a number of law professors and experts *MIRS* reached out to comment on legislation introduced in the last two weeks in response to the Nassar scandal.

Michigan Law Revision Commission Chair Richard **McLELLAN** pointed out two weeks ago that the retroactive look back bill could well violate the bans in the U.S. Constitution and Michigan Constitution against the adoption of *ex post facto* laws (See "**MI Legal Expert: Nassar Legislation Could Be Unconstitutional**," 2/28/18).

That package includes: 🐾 **SB 0872** sponsored by Sen. David **KNEZEK** (D-Dearborn Heights) that would change the statute of limitations for civil suits arising out of alleged conduct that could be criminal sexual conduct and allow for recovery of damages for events that occurred after Dec. 31, 1992.

O'Brien's 🐾 **SB 0871** would change the statute of limitations for second degree criminal sexual conduct against an individual under the age of 18 to a period of 30 years, or to the alleged victim's 48th birthday, whichever is later.

To illustrate his concerns, Laycock, who's served as lead counsel in six cases argued before the U.S. Supreme Court, offered up a hypothetical example of an abuse allegation made against a reverend.

"So, suppose a middle-aged plaintiff files suit and says '30 years ago, when I was 15, Reverend X molested me in the church, and that incident caused me to suffer various emotional and psychological damages,'" said Laycock.

He noted whoever supervised Reverend X may be dead, or senile. Reverend X himself may be dead or senile. The church secretary is long gone with no forwarding address. Much of the membership of the church has turned over. There may be no remaining witnesses of any kind except the plaintiff.

"And if we can find any of those witnesses, they aren't likely to remember anything after 30 years. If their suspicions were aroused at the time, they may remember. But if not -- if they never saw anything suspicious -- why should they remember anything about the comings and goings of a particular teenager 30 years ago, and whether he was ever alone with Reverend X in the church at the times he said he was?"

If those around 30 years ago don't remember anything, Laycock, who's represented both sides of abuse allegations contends "Reverend X has little chance of finding any witness who can help corroborate his story, and the more completely innocent he is, the less chance he has.

So, in many of these cases, the plaintiff will be the only witness. And he will be free to say anything he wants, without fear of contradiction," he added.

The U of V law professor notes a "fair number" of plaintiffs that bring forward allegations under the extended Statute of Limitations "will be telling the truth, but we have no good way to know which ones.

"At least a few of them will be total frauds, just making it up and trying to collect a settlement," Laycock said of civil suits. "Another large number of them will be telling the truth as they remember it, but their memory will no longer be accurate."

Beyond proving or disproving what may or may not have happened in the hypothetical church, Laycock said the 30-year statute of limitations also makes determining "damages" all but impossible.

"The harm that plaintiffs claim in these cases -- depression, marital difficulties are common allegations -- are very widespread in the population," he points out. "Most cases were not caused by sexual abuse. Causation is hard to figure out in the best of circumstances. Causation from 30 years ago is nearly impossible."

The Detroit News

Our Editorial: In fight for victims, don't stretch law



The Detroit News

published 10:25 a.m. on Feb. 25, 2018

(Photo: Jonathan Oosting)

The rush to “do something” in the wake of the Dr. Larry Nassar abuse scandal at Michigan State University is in full swing. Multiple investigations are underway, and now the Legislature has stepped in with its proposed fixes. And while some of the measures are important, lawmakers should ensure they don’t unintentionally go too

far in stretching the law to prevent abuse and punish those responsible.

Sen. Margaret O’Brien, R-Portage, announced the legislation Monday at a press conference that included several of the gymnasts who testified against Nassar. More than 200 women shared their stories in court ahead of Nassar’s sentencing.

Their testimonies are powerful. And the the fact Nassar was allowed to continue practicing for decades demands a response.

O’Brien’s bipartisan legislation is sweeping, with a focus on fighting sexual assault and increasing legal protections for survivors.

“It is important that our laws protect those who are most vulnerable, including our children,” said O’Brien in a statement. “This legislation would put fear into the heart of any possible perpetrator. Justice must be served.”

The Legislature seems keen to move quickly. The Senate Judiciary Committee approved the legislation Tuesday, including an amendment to add the possibility of jail time for adults who fail to report child abuse allegations. The legislation would expand mandatory reporter laws for child sex abuse to university and youth coaches and trainers, just as

clergy, teaching and medical professionals are required to report allegations of abuse to police.

There was a clear lack of accountability at MSU. The Detroit News has reported that at least 14 university representatives were aware of Nassar's actions — but did nothing about it.

The bills also would toughen child pornography penalties and eliminate governmental immunity for state institutions and their employees in sexual assault cases, among other measures.

Rachael Denhollander, an attorney and the first woman to publicly accuse Nassar in 2016, spoke at O'Brien's press conference, and her influence can be felt in the bills.

"Speak for those who have no voice," Denhollander told lawmakers. "Prioritize their safety because they depend on you."

Yet some elements in this legislation should be more carefully vetted. Several proposals seek to extend the statute of limitations by up to 30 years beyond the accuser's 18th birthday, giving victims decades to bring criminal charges or civil lawsuits against the accused, as well as the institution that employed the individual.

According to O'Brien, her "bills would update current law to allow prosecutors to bring charges of second-degree criminal sexual conduct (CSC) against a minor at any time after the act occurs, while also allowing charges of third-degree CSC against a minor up to the survivor's 48th birthday, or within 30 years of an accuser being identified by DNA evidence."

Allowing for that much time to pass can make truth finding difficult for courts and justice more elusive. Victim statements in most cases would be the only evidence. Institutions would be forced to defend themselves against charges stemming from incidents 30 or 40 years in the past in which those involved may no longer be in their employ, or even dead.

And it would open the floodgates for lawsuits. This piece of the legislation needs far more consideration, and should not be moved forward without impact studies.

The American Civil Liberties Union of Michigan has raised concerns about "unintended consequences" and said proposed changes to the statute of limitations could be unconstitutional if they apply retroactively. That's a legitimate point. Any new laws should apply only to future incidents.

Lawmakers should tread carefully around the statute of limitations. Other portions of the legislation, however, are worthwhile and could help prevent another abuser like Nassar from harming children.

<http://www.detroitnews.com/story/opinion/editorials/2018/02/28/fight-victims-stretch-law/110956518/>

The Detroit News

Editor's Note: Hit pause on Nassar bills

Ingrid Jacques, The Detroit News

Published 10:45 p.m. on April 9, 2018

(Photo: Dale G. Young / The Detroit News)



The pressure is growing on Michigan lawmakers to punish perverts like former Michigan State sports Dr. Larry Nassar and the institutions that enabled them — and in doing so offer victims some sort of justice. The Legislature should put in place a framework that will guard against future abuse (especially of children), but it must be careful not to take the legislation to an extreme.

The bills that passed swiftly out of the Senate a few weeks ago have raised plenty of alarms from an array of groups, including business, religious and educational institutions. And lawmakers should listen to those concerns, most of which revolve around [Senate Bill 872](#) that would significantly extend the state's statute of limitations and include retroactive provisions with implications far beyond MSU.

Although that bill was slightly amended prior to passage, it wasn't changed enough to alleviate core problems.

Lawmakers are feeling intense pressure from Nassar's many victims and their advocates to pass the legislation as it stands. The victims, including Rachael Denhollander who first publicly accused Nassar of abuse, were influential in crafting the legislation spearheaded by Sen. Margaret O'Brien, R-Portage.

The Senate language would extend the statute of limitations for filing a sexual misconduct civil lawsuit to 30 years for minors and 10 years for adults, and it would be retroactive back to 1997 for abused minors. Victims would have one year to file a claim. The statute would be extended for criminal cases, too, but not retroactive.

Trial lawyers, who would see a boon if the legislation passed, are getting involved. A California lawyer who specializes in childhood sexual abuse civil cases has been working with lawmakers.

According to sources close to the negotiations, lawmakers with reservations are being labeled as "no better than Nassar." That kind of bullying isn't helpful, and the consequences of this legislation are extensive enough that the bills demand a more thorough discussion.

House Speaker Tom Leonard, R-DeWitt, has said passing the bills will be a priority following lawmakers' return from spring break next week — including those related to the statute of limitations. Other chamber members such as Law and Justice Committee Chair Klint Kesto, R-Commerce Township, have expressed a more cautious tone. Kesto has said he wants justice for the survivors but also wishes to prevent unintended consequences. That's a better approach.

<https://www.detroitnews.com/story/opinion/columnists/ingrid-jacques/2018/04/02/nassar-bills-sex-abuse/33495087/>